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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1779

GEORGE D. OWEN,
Petitioner,

vs.

THE CITY OF INDEPENDENCE, MISSOURI, LYLE W. ALBERG, CITY MANAGER, RICHARD A. KING, MAYOR, CHARLES E. CORNELL, DR. RAY WILLIAMSON, DR. DUANE HOLDER, RAY A. HEADY, MITZI A. OVERMAN, AND E. LEE COMER, JR., MEMBERS OF THE COUNCIL OF THE CITY OF INDEPENDENCE, MISSOURI,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONER

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OPINIONS BELOW

The opinion of the Court of Appeals on Remand is reported at 589 F.2d 335 and is printed at Pet. App. A1-A7. The prior opinion of the Court of Appeals is reported at 560 F.2d 925 and is printed in Pet. App. A8-A45. This Court's previous memorandum order is reported at 438 U.S. 902, 98 S.Ct. 3118, 57 L.Ed.2d 611, and is printed at Pet. App. A79. The opinion of the District Court is reported at 421 F.Supp. 1110 and is printed at Pet. App. A46-A78.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on December 1, 1978. Petition for rehearing was denied by a divided court on January 29, 1979. The time for filing a petition for writ of certiorari was extended to May 29, 1979 by order of Justice Blackmun signed April 10, 1979. The petition for writ of certiorari was filed on May 29, 1979, and granted October 1, 1979. The jurisdiction of this Court rests at 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Should the qualified immunity available to local officials in their individual capacities under *Wood v. Strickland* be extended to local governmental bodies?

2. If qualified immunity is extended to municipalities, should it be further extended to bar declaratory and equitable relief as well as damages?

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42:

§1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT[1]

On and before April 18, 1972, petitioner was employed as the chief of police of Independence. Under Section 3.3(1) of the city charter, he could be removed by the city manager only "when deemed necessary for the good of the service." (Pet. App. at A32)

During a city council meeting on April 17, 1972, Paul Roberts, in his capacity as city councilman, read a written statement "impugning Owen's honesty and integrity." (Pet. App. at A31) The statement alleged that Owen had misappropriated police department property, that narcotics had "mysteriously" disappeared from his office, and that high ranking police officials had made "inappropriate" requests affecting the police court. It also alleged manipulation of traffic tickets, the "unusual release of felons" and the mysterious disappearance of money. As part of his statement, Roberts moved that certain "investigative reports" allegedly supporting the allegations be turned over to the prosecutor for presentation to the grand jury, that they be released to the press and that the city manager take "direct and appropriate action" against those "involved in illegal, wrongful, or gross inefficient activities." The full text of the statement and motion is set forth in the Appendix at 24-25.

The city council by official action passed the motion with one abstention and no dissents, thus lending its support to Roberts' charges. (Pet. App. at A16, A31) The following day, the city manager discharged Owen. (Pet. App. at A26) The discharge notice contained no reason for the discharge but stated simply that Owen was "[t]er-

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1. Throughout this brief, "Pet. App. at ....." shall refer to the Appendix to the Petition for Certiorari, "App. at ....." shall refer to the Joint Appendix, and "Tr. ....." shall refer to the transcript of testimony.

minated under the provisions of Section 3.3(1) of the City Charter." (P.Ex. 2, App. at 17, Tr. 18, Pet. App. at A31) The city manager reinforced the council's implication that Owen was guilty of wrongdoing by publicly announcing that he was referring the reports of alleged police department inefficiency to the prosecutor for submission to the grand jury. (Pet. App. at A3-4, Pet. App. at A31, n. 11) He did not disavow the charges or the council's actions or take any steps to contradict reports that Owen's discharge was the direct result of the alleged misconduct.

The press and public were present at the April 17, 1972 city council meeting. (Tr. at 12, 49, 82 and 189) Copies of the statement and motion were distributed to them. The statement, motion and firing received widespread publicity. (Pet. App. at A31) The area newspapers printed the statement and motion substantially verbatim and reported the adoption of the motion. Front page articles appeared for several days under headlines such as "Lid Off Probe, Council Seeks Action" (Independence Examiner, April 18, 1972, P.Ex. 5, Tr. 25); "Independence Accusation. Police Probe Demanded" (Kansas City Times, April 18, 1972, P.Ex. 6, Tr. 25); "Probe Culminates in Chief's Dismissal" (Independence Examiner, April 19, 1972, P.Ex. 13, Tr. 27) and "Police Probe Continues; Chief Ousted". (Community Observer, April 20, 1972, P.Ex. 14, Tr. 27) A copy of the statement and motion was placed in the City's permanent records. (Tr. at 81-82)

Owen twice requested a hearing. (Pet. App. at A16-17, Pet. App. at A54-56, P.Ex. 3, App. at 18-19, Tr. 22, D.Ex. 8, App. 26, Tr. 173) His request for a hearing was denied by the City by letter dated May 3, 1972 from the city counselor's office. (Pet. App. at A4 and A17) The City never provided Owen with a hearing to vindicate his name. (Pet. App. at A5) The grand jury subsequently returned a no true bill.

Owen brought suit under 42 U.S.C. §1983, and the Fourteenth Amendment asserting jurisdiction under 28 U.S.C. §1331, 28 U.S.C. §1343(3) and 28 U.S.C. §1343(4). He sought declaratory and equitable relief, including a hearing on his discharge, back pay and attorney's fees. The District Court entered judgment for defendants (Pet. App. at A46)

Or appeal, the United States Court of Appeals for the Eighth Circuit reversed, ordering the entry of a declaratory judgment that Owen's discharge had deprived him of liberty without due process of law. In lieu of an award of full back pay, it ordered equitable compensation measured by the amount Owen would have earned to retirement if he had not been deprived of his good name by the actions of the City, less mitigation. The Court of Appeals held that the District Court had jurisdiction under 28 U.S.C. §1331 to grant equitable relief for Owen's Fourteenth Amendment claims. The court found it unnecessary to decide whether 28 U.S.C. §1343 and 42 U.S.C. §1983 provided an additional basis for jurisdiction. (Pet. App. at A22)

On June 26, 1978, this Court vacated the Court of Appeals' prior decision for reconsideration in light of *Monell v. Department of Social Services*, 436 U.S. 658 (1978). On remand, the Court of Appeals found that the City of Independence was subject to suit under *Monell* since the actions in question were those of the City's highest ranking officials. (Pet. App. at A3-4) It again found that petitioner had been deprived of his constitutional right to liberty without due process. It reaffirmed its prior finding that the City stigmatized Owen. (Pet. App. at A3) It further found that "such conduct amounted to official policy causing the infringement of Owen's constitutional rights, in violation of §1983." (Pet. App. at A4)

However, the Court of Appeals ruled that petitioner should be denied all relief on the basis that the City was entitled to qualified "good faith" immunity. The court held that a city was entitled to such immunity for violations of any right unless the right had been expressly declared by Supreme Court decision prior to the city's action.[2] The Court rejected petitioner's contentions (a) that the defense of "good faith" is limited to officeholders in their individual capacities and does not extend to governmental entities, (b) that qualified immunity does not forbid the granting of equitable relief, and (c) that qualified immunity does not justify refusal to issue a declaratory judgment. Rehearing and rehearing *en banc* were denied by a vote of five to two.

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2. The Court concluded that, prior to *Roth* and *Sindermann*, the City could not have known that its actions violated Owen's rights despite recognizing that:

> "Before Owen's discharge, the Supreme Court appeared to find a liberty interest '[w]here a person's good name, reputation, honor, or integrity [was] at stake because of what the government [was] doing to him,' which, when infringed, required the Government to provide the individual with notice and an opportunity to be heard. *Wisconsin* v. *Constantineau*, 400 U.S. 433, 437, 91 S.Ct. 507, 510, 27 L.Ed.2d 515 (1971). However, not until the *Roth* and *Sindermann* cases did the Court first recognize that a public employee, in the context of being terminated under circumstances imposing a stigma on his professional reputation and impairing his ability to find future employment, was entitled to notice and a name-clearing hearing." (Pet. App. at A67 n. 1) (Bracketed material in opinion)

SUMMARY OF ARGUMENT

Municipalities are entitled to qualified immunity in suits under 42 U.S.C. §1983 only if they enjoyed a firmly established, well-recognized qualified immunity at common law and that common law immunity was supported by policy considerations which would be equally persuasive in the context of §1983. No such common law qualified immunity for municipalities existed. Moreover, the policy considerations which supported those immunities which did exist (e.g. the qualified immunity of local officials) are entirely unpersuasive in the context of §1983 actions against local governmental entities.

The language of 42 U.S.C. §1983 allows for no immunities. It provides that "every person" shall be liable and makes no distinctions among defendants. However, this court has recognized that some government officials do enjoy certain immunities in §1983 actions. None of these immunities has been created by judicial fiat. Each has been the result of a considered judgment that the particular immunity was so thoroughly ingrained in the common law and its rationale so applicable to §1983 that Congress would not have abrogated it without doing so expressly. Congress's silence cannot be deemed to have created new immunities or to have conferred them on those who did not have them at common law.

In 1871, cities enjoyed no qualified immunity. As the 42nd Congress knew, suits against cities—both in tort and contract—were a frequent occurrence. There appear to have been no cases holding or stating that a city was exempted from liability because its officials held a good faith belief that their actions were lawful. In the few cases in which the situation arose or was discussed, the court held or stated that the city remained liable despite the reasonable beliefs of its officials. The leading

case to that effect, *Thayer v. Boston*, 19 Pick. 511 (1837) was actually cited in the debates on the Act. The members of the 42nd Congress were well-versed in the common law. The fact that no member mentioned any form of immunity available to municipalities while members did discuss immunities available to public officials is a strong indication that no municipal immunities existed.

Since cities enjoyed no qualified immunity, Congress's silence cannot be deemed to have conferred one on them. This is particularly true since the policy considerations which supported qualified immunity for officials would not have supported a similar immunity for municipalities. It is unfair to force a city official to bear the cost of a reasonable mistake made in the pursuit of the city's interests; but it is eminently fair that the city bear the cost of that mistake just as it would have received the benefit of the official's act if it had been held lawful. While even a small risk of personal financial loss may paralyze municipal officials, even substantial risk of municipal loss has no such effect. Municipal officials regularly face and weigh such risks and there is no reason to believe that Congress would have wanted the risk of constitutional harm to receive less consideration than other risks. Finally, the risk of municipal immunity will not deter capable candidates from seeking public office. Instead, it will give the voter an incentive to elect officials who give due consideration to the constitutional risks of their actions. Moreover, there is evidence in the debates that Congress intended to provide a remedy for violations of constitutional rights even if those rights had not been articulated by judicial decision. Since official immunity precludes obtaining that remedy from the officials involved, Congress must have intended that the relief be granted against the municipality itself.

ARGUMENT

I

The Significance of *Monell* in Defining the Considerations Applicable to Decision of the Issues Presented.

In *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 690 (1978) this Court specifically held from the legislative history that local municipalities are "persons" suable under §1983.

> "Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress *did* intend municipalities and other local government units to be included among those persons to whom §1983 applies." (Emphasis in opinion)

It is clear from *Monell* that the Civil Rights Act of 1871 was a remedial act and to be liberally and benefically construed, as intended by the 42nd Congress. It was intended to give a broad remedy for violations of federally protected rights. *Id.* at 684-685. The Eleventh Amendment is no bar to municipal liability and there is no other constitutional impediment to municipal liability. *Id.* at 687. Local governing bodies may be sued directly under §1983 for monetary, declaratory, or injunctive relief where the action alleged to be unconstitutional implements, as here, a decision officially promulgated and adopted by that body's officers. *Id.* at 691. Municipalities can assert no reliance claim to support an absolute immunity. *Id.* at 699-700.

Proceeding further in its analysis of the legislative history of the Act, the court concluded that "a municipality cannot be held liable *solely* because it employs a tortfeasor - or in other words, a municipality cannot be held liable under §1983 on a *respondeat superior* theory." *Id.* at 696.

It so concluded from its reading of the language of the Act that "any person who . . . *shall subject or cause to be subjected,* any person to the deprivation of any rights . . ." (Emphasis in opinion).

This court went no further in its holding as to municipal liability under §1983:

> "In so doing, we have no occasion to address, what the full contours of municipal liability under §1983 may be. We have attempted only to sketch so much of the §1983 cause of action against a local government as is apparent from the history of the 1871 Act and our prior cases and *we expressly leave further development of this action to another day.*" *Id.* at 695 (Emphasis added)

Nor did the Court even suggest in *Monell* that public treasuries should have qualified immunity. On the contrary, the Court made clear that it was *not* indicating whether any immunity should be afforded public treasuries when it stated (*Id.* at 701):

> "[*W*]*e express no views* on the scope of *any* municipal immunity beyond holding that *municipal bodies sued under §1983 cannot be entitled to an absolute immunity,* lest our decision that such bodies are subject to suit under §1983 'be drained of meaning.' *Scheuer v. Rhodes,* 416 U.S. 232, 248 (1974). Cf. *Bivens v. Six Unknown Federal Narcotics Agents,* 403 U.S. 389, 397-398 (1971)." (Emphasis added)

It is thus settled law that cities have no absolute immunity under §1983.

II

Municipalities Are Not Entitled to Qualified Immunity in Suits under 42 U.S.C. §1983 Unless They Enjoyed a Firmly Established, Well-Recognized Qualified Immunity at Common Law and That Common Law Immunity Was Supported by Policy Considerations Which Would Be Equally Persuasive in the Context of §1983.

The questions presented in this case are one of "construction of a federal statute." *Wood v. Strickland,* 420 U.S. 308, 314 (1975). This Court must look to the legislative history of §1983 and the common law prior to 1871 to determine what rights the 42nd Congress intended to protect by judicial relief and what limitations it intended to place thereon.

As to any class of defendants, there has always been a strong initial presumption that it enjoys no form of immunity under 42 U.S.C. §1983. The language of the section is absolute and "on its face admits of no immunities. . . ." *Imbler v. Pachtman,* 424 U.S. 409, 417 (1976). It provides that "every person" shall be liable and makes no distinctions among defendants. Defendants were to be liable "in an action at law, suit in equity, or other proper proceeding for redress," and the members recognized that monetary relief was among the remedies provided. See, e.g. Cong. Globe, 42d Cong., 1st Sess., App. at 217 (hereinafter "Globe App."). The act was to be liberally construed to accomplish its remedial purposes and its language was to be given "the largest latitude consistent with the words employed . . . ." Globe App. at 68; *Monell v. Department of Social Services of the City of New York,* 436 U.S. 658, 684 (1978); *Lake Country Estates v. Tahoe Regional Planning Agency,* 440 U.S. 391, 400 at n. 17 (1979). In light of §1983's absolute language

and remedial purposes, no immunity has been recognized unless the particular immunity was so thoroughly ingrained in the common law and its rationale so applicable to §1983 that Congress could not have intended to abrogate it without expressly declaring its intent. An immunity has been recognized only when the Court has found itself unable to "believe that Congress . . . would impinge on a tradition [of immunity] so well grounded in history and reason by covert inclusion in the general language [of §1983]." *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951). With respect to each such immunity the Court has concluded that "Congress would have specifically so provided had it wished to abolish the doctrine." *Pierson v. Ray*, 386 U.S. 547, 555 (1967).

The first requirement is that the particular immunity was known to be available to the defendant at common law. Congress could not have intended, by its silence, to create an immunity that was unknown to the common law and thus to Congress itself. If its silence did not change the common law to abolish immunities, it surely did not change the common law to create or extend them.

In each case in which this court has held that a type of public official enjoyed a form of immunity, it has based that holding on the existence of a common law immunity. In *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951), the court stated that legislative immunity had "taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries." The court traced the history of the immunity from England, through colonial times, and into the Constitution itself. It concluded that it could not "believe that Congress . . . would impinge on a tradition so well founded in history and reason by covert inclusion in the general language before us." *Id.* at 376.

In *Pierson v. Ray*, 386 U.S. 547, 553, 554 (1967), the court stated that "[f]ew doctrines were more solidly established at common law than the immunity of judges . . . ." The court held that judicial immunity, and the common law immunity of policemen when acting in good faith and with probable cause, were preserved by §1983.

In *Scheuer v. Rhodes*, 416 U.S. 232, 239 at n. 4, 246 at n. 8 (1974) and *Wood v. Strickland*, 420 U.S. 308, 318 (1975), the court held that executive officials and school board members had enjoyed at common law only a limited or qualified immunity. In each case, the immunity recognized under §1983 was essentially that recognized at common law. *Imbler v. Pachtman*, 424 U.S. 409, 419 (1976). In *Imbler*, the Court reviewed its prior decisions on immunities and stated that "each was predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." *Id.* at 421.

If, as in the present case, the immunity claimed by the defendant is one which it did not enjoy at common law, that properly ends the inquiry. If, on the other hand, the defendant did enjoy the immunity at common law, the court has gone on to determine whether the considerations underlying that common law immunity were sufficiently persuasive in the context of §1983 to justify the inference that Congress must have intended to preserve the immunity. Thus, in *Imbler v. Pachtman*, 424 U.S. 409, 424 (1976), the court, after determining that prosecutors enjoyed absolute immunity at common law, went on to say: "We now must determine whether the same considerations of public policy that underlie the common-law rule likewise countenance [the] immunity under §1983." The inference that the 42nd Congress intended to preserve an existing common law immunity can be drawn only if the justification for that immunity is equally persuasive in the context of §1983.

III

Municipalities Did Not Enjoy Qualified Immunity Under the Common Law in 1871.

In 1871, cities enjoyed no qualified immunity. Cities were frequently sued—both in tort and contract. Suits against municipalities to enforce the contract clause were well known to the 42nd Congress. *Monell v. Department of Social Services of the City of New York,* 436 U.S. 658, 673 and n. 28 (1978); Globe App. at 314-315; Cong. Globe, 42d Cong., 1st Sess. 751-752 (hereinafter "Globe"); Globe 777. Suits against cities for personal injury, though of less general public interest, were also frequent and were discussed in the debates. See, e.g. Globe 788; Globe 792.

There appear to have been no cases holding or stating that a city was exempted from liability because its officials held a good faith belief that their actions were lawful. On the contrary, when cities were sued, they were liable on the same basis as individuals. Senator Stevenson, quoting *Prather v. Lexington,* 13 Ben. Monroe's Kentucky Reports 559, 560 (1852), stating the prevailing law as follows:

> "Where a particular act, operating injuriously to an individual, is authorized by a municipal corporation, by a delegation of power either general or special, *it will be liable for the injury in its corporate capacity, where the acts done would warrant a like action against an individual.* But as a general rule a corporation is not responsible for the unauthorized and unlawful acts of its officers, although done under the color of their office; to render it liable it must appear that it expressly authorized the acts to be done by them, or that they were done in pursuance of a general authority to act for the corporation on the subject to which they relate. (*Thayer v. Boston,* 19 Pick. 511.) It has also been held that *cities are responsible to the same extent, and in the same manner, as natural persons* for injuries occasioned by the negligence or unskillfulness of their agents in the construction of works for their benefit." Globe 762 (Emphasis added)[3]

Senator Stevenson's reference to *Thayer v. Boston,* 19 Pick. 511 (1837) is significant. *Thayer* was a leading case in which the Massachusetts Supreme Court declared that a municipality would be held liable in a tort action despite the good faith belief of its officials that they were acting lawfully. The court stated:

> "There is a large class of cases, in which the rights of both the public and of individuals may be deeply involved, in which it cannot be known at the time the act is done, whether it is lawful or not. The event of a legal inquiry, in a court of justice, may show it was unlawful. Still, if it was not known and understood to be unlawful at the time, if it was an act done by the officers having competent authority, either by express vote of the city government, or by the nature of the duties and functions with which they are charged, by their offices, to act upon the general subject matter, and especially if the act was done with an honest view to obtain for the public some lawful benefit or advantage, reason and justice obviously require that the city, in its corporate capacity, should be liable to make

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3. The second sentence of the passage quoted above does identify one way in which municipalities were treated in a different manner than ordinary defendants: they were not held to the strict rigor of *respondeat superior.* In a striking parallel to *Monell,* Senator Stevenson indicated that cities would not be liable simply because their employees committed a tort, but would only be liable if the employee had been expressly authorized to commit the wrong (cf. "official policy" under *Monell*) or was an officer with general authority to act for the city (cf., those "whose edicts or acts may fairly be said to represent official policy" under *Monell*).

good the damage sustained by an individual, in the consequence of the acts thus done." *Id.* at 515.

Thayer was not an aberration. In *Hurley v. Town of Texas*, 20 Wis. 634, 637-638 (1866), the Supreme Court of Wisconsin quoted *Thayer* with approval and permitted recovery despite the good faith of the town officials. (The officials had been placed in the awkward position of having to follow two statutes which gave irreconcilably contradictory instructions on the same subject.)

In *Lee v. Village of Sandy Hill*, 40 N.Y. 442 (1869), the New York Court of Appeals applied the same principle to a case in which village trustees had removed a landowner's fence. The court expressly found that the trustees had acted in good faith and not willfully. *Id.* 450, 451. Nonetheless, it held that, "[i]n such a case, the corporation is liable." *Id.* 452.

Similarly, in *Squiers v. Village of Neenah*, 24 Wis. 588, 593 (1869), the court held the village liable for trespass, stating:

> "The proceeding, therefore, although unlawful, was not one which was so known or understood at the time. It was a proceeding on the part of public officers having, under the circumstances supposed, competent authority to act upon the general subject-matter and whose acts were performed with an honest view to obtain for the public a lawful benefit or advantage. The case presented, therefore, is one falling fully within the principle stated in *Thayer v. Boston* . . . ."

Another example is *McCombs v. Town Council of Akron*, 15 Ohio 474, 479 (1846) in which the Supreme Court of Ohio held that a municipality could be liable even though its officials' actions were "unattended by any circumstance of negligence or malice."

The fact that the debates of the 42nd Congress reveal no discussion of qualified immunity for municipalities is strong evidence that no such immunity existed. Nowhere in the debates on the Civil Rights Act of 1871 does any Member of Congress suggest that a municipality was exempt from liability for injury resulting from acts of its officials because those officials reasonably believed those actions to be lawful. The Members were steeped in the common law and thoroughly familiar with the immunities it granted. Where a broad interpretation of §1 of the Act would impair one of those immunities, opponents of the Act were quick to point it out. Opponents argued that the Act should be defeated because §1 could be interpreted to abolish judicial immunity—to reverse "the old maxim of the law that a judge for any judgment he gives can only be liable to impeachment . . . and [to permit] that judge to be dragged into Federal Court to be mulcted in damages . . . ." Globe App. 217; Globe 365-366. They charged that §1 would impinge on legislative immunity, interfering with freedom of legislative debate. Globe App. 217; Globe 365. They charged it would make governors (Globe 365), sheriffs (Globe 365), and other public officers (Globe 385) liable despite their good faith—liable despite "acting under a solemn, official oath, though as pure in duty as a saint and as immaculate as a seraph, for a mere error in judgment . . . ." Globe 365; Globe 385.

Thus, Act opponents argued that §1 could be deemed to infringe the common law immunities enjoyed by public officials. If there had been an immunity exempting municipalities from liability for their officers' good faith actions, the opponents would not have hesitated to point out—as another reason to vote against the Act—that §1 could be interpreted to violate that immunity as well. That no such argument was made is further strong evidence that no such immunity existed.

IV

The Considerations Supporting Immunity for Officials Do Not Support Creation of Such an Immunity for Cities.

A. The Considerations Discussed in This Court's Prior Official Immunity Cases Do Not Support Municipal Immunity.

The 42nd Congress could not have intended its silence to be interpreted to create an immunity for cities which was unknown to the common law and to Congress itself. If express statutory language was required to repeal an immunity which a defendant had at common law, surely express language was required to create an immunity which the defendant did not have. Cities were not immune from liability for actions taken by their officers in good faith belief that the actions were lawful. Properly speaking, that fact ends the inquiry. Defendants are not free to claim an immunity which Congress did not intend them to have, just because defendants think that the immunity might serve the public interest.

In each of its §1983 immunity cases, this court has explored the considerations supporting the immunities against personal liability afforded officials at common law. *Tenney v. Brandhove,* 341 U.S. 367, 373-374 (1951); *Pierson v. Ray,* 386 U.S. 547, 554-555 (1967); *Scheuer v. Rhodes,* 416 U.S. 232, 239-242 (1974); *Wood v. Strickland,* 420 U.S. 308, 319-320 (1975); *Imbler v. Pachtman,* 424 U.S. 409, 424-429 (1976). But it has done so only after finding that the defendant was afforded the personal immunity by the common law and only for the purpose of determining whether the purposes of the common law immunity were equally applicable in suits against the defendant under §1983. In no case has this court suggested that it would be appropriate to superimpose an immunity on the structure

of §1983 simply because it seemed sound public policy to do so. *Imbler v. Pachtman, supra* at 421.

But even if public policy reasons could provide an independent ground for recognizing an immunity unknown to the 42nd Congress, no qualified immunity for cities would be justified. Three reasons have generally been given for qualified official immunity: First, that personal liability would deter officials from acting forcefully and in the public interest. *Scheuer v. Rhodes,* 416 U.S. 232, 240 (1974); *Wood v. Strickland,* 420 U.S. 308, 319-320 (1975). Second, that personal liability would deter the most capable candidates from seeking office. *Id.* at 320. Third, that imposing personal liability for acts done in the good faith pursuit of public benefits is unfair to public officials. *Id.* at 319; *Scheuer v. Rhodes, supra* at 240.[4] None of these reasons have force when the liability in question is municipal rather than personal.

The risk of personal loss for actions taken in good faith may have a paralyzing effect on government officials. The risk of municipal loss does not. City officials regularly make decisions which, if wrong, may impose substantial costs on the city treasury. Public officials fire employees every day even though they know that the city will have to pay for their action if a civil service commission or state court or grievance panel finds that the firing was unjustified or procedurally improper. City

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4. The Court's decisions granting absolute immunity have articulated similar reasons underlying it. In *Tenney v. Brandhove,* 341 U.S. 367, 373-374 (1951), the court held that absolute legislative immunity enabled legislators "to execute the functions of their office without fear of prosecutions, civil or criminal." In *Pierson v. Ray,* 386 U.S. 547, 554 (1967), the court said that personal liability "would contribute not to principled and fearless decision making but to intimidation." In *Imbler v. Pachtman,* 424 U.S. 409, 424-425 (1976), the court said that absolute immunity was needed so that prosecutors would not be "constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages."

officials build airports knowing that inverse condemnation suits could cost the city hundreds of thousands of dollars. Selection of the wrong contractor for a public project, or of a less expensive but less comprehensive form of insurance for public buildings, or of one rather than another date to issue municipal bonds can impose costs on a municipality that would dwarf the cost of a judgment under §1983. Nonetheless, the risks are weighed, alternatives are analyzed and decisions are made.

It is perfectly appropriate that constitutional risks be included in this decision-making calculus. It would be strange if constitutional rights were to be given less weight than contractual or statutory rights. The purpose of qualified personal immunity for officials is not to let them disregard the risk of constitutional harm. Rather, it is to insure that public officials can make decisions on the close constitutional questions that come before them without having their judgment clouded by personal considerations, i.e. the risk of personal financial loss. The inhibiting effect of this risk is entirely eliminated by the decisions granting immunity to the official himself. There is no need to extend the immunity to cover the city treasury as well.

With constant re-examination of constitutional principles as part of the democratic process, it is in the public interest that persons not be discouraged from seeking constitutional rights as yet undeclared or from seeking to correct constitutional wrongs not yet fully defined. Such efforts will be greatly discouraged if a constitutional right is found to exist and to have been violated, but the harm goes without redress.

It is not a criticism of city officials to suggest that few airports would be built if the officials were personally liable in all ensuing inverse condemnation suits. Yet

it has never been suggested that good faith is a defense available to the city treasury in such a case.[5]

The contrast between the effect of personal and municipal liability was recognized in *Thayer v. Boston,* 19 Pick. 511, 515-516 (1837). After stating that the city could be liable in its corporate capacity despite the reasonable belief of its officers that their actions were lawful, the court went on to say that, in the same situation, personal liability

> "would be harmful to the city itself, in its corporate capacity, by paralyzing the energies of those charged with the duty of taking care of its most important rights, inasmuch as all agents, officers and subordinate persons, might well refuse to act under the direction of its government in all cases, where the act should be merely complained of, and resisted by an individual, on whatever weak pretence . . . ."

As previously noted, the *Thayer* decision was not unknown to Congress. Globe 762.

The second consideration justifying qualified immunity—that it might deter qualified candidates from seeking office—is equally inapplicable when the liability imposed is municipal rather than personal. Unlike personal liability, municipal liability does not raise the prospect of "heavy burdens upon their private resources . . . ." *Wood v. Strickland, supra* at 320. If anything, responsible citizens

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5. It may be suggested that city officials could not have a reasonable belief that they had the right to take the inverse condemnee's property without just compensation. This misses the point. In the typical proceeding, the officials have a good faith belief that what they did did not constitute a "taking" of the plaintiff's property and therefore did not violate his rights. If the suggestion were valid, no official could ever claim qualified immunity. It could always be argued that he must have known he had no right to violate the Constitution regardless of the reasonableness of his belief that his actions did not constitute such a violation.

will be made more likely to seek office, since an official's error will create municipal liability which the citizen will share. It will give citizens an incentive to elect officials who give full and careful thought to the constitutional implications of their actions.

The third justification for qualified official immunity —that it is unfair to force public officials to bear the liability for good faith attempts to obtain lawful benefits for the public—is self-evidently inapplicable to public treasury liability. It is eminently fair that the burdens be born by the same persons who would receive the benefits. Once again, the rationale was stated in *Thayer v. Boston*, 19 Pick. 511, 515 (1837), in which the court said, "if the act was done with an honest view to obtain for the public some lawful benefit or advantage, reason and justice obviously require that the city, in its corporate capacity, should be liable to make good the damage . . . ."

B. Municipal Immunity Would Be Inconsistent With the 42nd Congress's Remedial Intent.

Moreover, to give qualified immunity to cities for the good faith actions of their highest officials would defeat the remedial purpose of the Civil Rights Act of 1871—to provide full relief for constitutional harms. The 42nd Congress knew that the scope of the rights of Americans involved close and unresolved questions of constitutional interpretation and it intended to give a remedy for violations of those rights even if they had not yet been articulated by a definite Supreme Court decision. Congressman Dawes explained:

> "I talk of nothing but constitutional guarantees; *I do not claim myself to be able to comprehend their full measure and scope.* As long as the American citizen shall live under this flag and expanding [sic] his

> pursuits in his honest endeavors, so long his constitutional guarantees will expand and grow with him, and be equal to and cover every lawful enterprise and undertaking of his within the limits of this Republic; and *no man can define them upon paper until they come up.*
>
> "*Whatever they be*, he, sir, who invades, trenches upon, or impairs one iota or tittle of the least of them, to that extent trenches upon the Constitution and laws of the United States, and this Constitution authorizes us to bring him before the courts to answer therefor. That covers, sir, all there is in the first and second sections of this bill." Globe 476. (Emphasis added)

Congress also realized that it would be many years before the Supreme Court issued opinions clarifying many of the rights created by the 13th and 14th Amendments. Senator Thurman said "[I]t will be a long time before the questions that would arise under this section would reach the Supreme Court of the United States and there be definitely settled." Globe App. 216. It is difficult to imagine that the 42nd Congress intended the remedial purposes of section 1 to be so long deferred.

The liberality with which the good faith defense may be applied broadly to immunize local public officials militates against its application to municipal liability, lest the legislative intent be drained of meaning. The reasons for a qualified good faith defense which broadly immunizes local public officials from personal liability are understandable as is the justifiable reluctance of courts to hold public officials personally liable. However, the liberal application of such a broad defense should limit its scope to personal immunity.

The circumstances in the instant case illustrate the argument. Both the trial court (Pet. App. A69) and the

Court of Appeals (Pet. App. A6-7) held the "objective test" of good faith immunized the local officials because they had no duty "to anticipate unforeseeable constitutional developments." On remand, the Court of Appeals interpreted qualified immunity to provide an *extremely broad exemption from liability*. The opinion stated (Pet. App. A6, n. 1):

> "Before Owen's discharge, the Supreme Court appeared to find a liberty interest '[w]here a person's good name, reputation, honor, or integrity [was] at stake because of what the government [was] doing to him,' which when infringed, required the Government to provide the individual with notice and an opportunity to be heard. *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971). However, not until the *Roth* and *Sindermann* cases did the Court first recognize that a public employee, in the context of being terminated under circumstances imposing a stigma on his professional reputation and impairing his ability to find future employment, was entitled to notice and a name-clearing hearing."

Under that interpretation, it was not sufficient to establish that prior Supreme Court decisions had implied the existence of a right or stated that it existed in a different context. Rather, the court required that the right must have been *expressly* declared by the Supreme Court in the particular context.

What was the state of the law with regard to procedural due process rights of terminated government employees, in April, 1972, when Owen was terminated without a hearing?

Although *Board of Regents v. Roth*, 408 U.S. 564, was decided by this Court on June 29, 1972, two months after the firing, it had been argued in January 18, 1972, and

certiorari had been granted in 1971. The prior decision of the Court of Appeals, *Roth v. Board of Regents*, 446 F.2d 806 (7th Cir.) decided July 1, 1971, stated that "Several Courts have found a due process right where dismissal or non-retention of a public employee jeopardized an interest in practicing a profession, or in preserving a professional reputation." *Id.* at 809, citing *Birnbaum v. Trussell*, (2d Cir. 1966) 371 F.2d 672; *Meredith v. Allen County Hosp. Com'n*, (6th Cir. 1968) 397 F.2d 33; *Lucia v. Dugan*, (D. Mass. 1969) 303 F.Supp. 112; *Orr v. Trinter*, 318 F.Supp. 1041 (S.D. Ohio 1970).

The trial and appellate court decisions prior to 1972 cited above had considered the exact circumstances involved in the instant case, i.e. actions by local governmental officials in the course of the termination of a governmental employee which had the effect of "stigmatizing" him and jeopardizing his professional reputation and opportunities for employment.

The statement of the law in *Roth* merely related the basic constitutional procedural due process right enunciated by *Constantineau* (1971) to the constitutional harm earlier proscribed by this Court in 1946 in *United States v. Lovett*, 328 U.S. 303, 314 (1946). In *Lovett*, petitioners had been discharged from government positions, proscribed from future employment and denied pay by an act of Congress. This Court held that there was a justiciable issue because the act of Congress had "stigmatized [petitioners'] reputation and seriously impaired their chance to earn a living."

In *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1965), this Court said: "'[D]ue process' unlike some legal rules is not a technical conception with a fixed content unrelated to time, place and circumstances." It is "compounded of history, reason, the past course of decisions . . ." citing *Joint Anti-Fascist Refugee Committee*

v. McGrath, 341 U.S. 123, 162, 163. Concluding that the particular circumstances of the discharge did not require a hearing, this Court said: "Finally it is to be noted that this is not a case where governmental action has operated to bestow a badge of disloyalty or infamy, with an attendant foreclosure from other employment opportunity." (Cites omitted) *Id.* at 898.

If the objective test of good faith, so broadly applied to immunize against personal liability, is transported so as to provide a defense for the municipality itself, the purpose of §1983 will be substantially defeated. If the "good faith" defense immunizes cities it will not serve the public good nor adequately protect individual constitutional rights, the denial of which was to be given a broad remedy by §1983. To the contrary, it would permit local government officials to act without concern either for the potential harm to individuals or the public interest.

C. Recent Decisions Establish That the Considerations Leading to Personal Immunity for Officials Cannot Be Rationally Applied to Create Municipal Immunity.

While events since 1871 cannot inform us as to the intent of the Congress which enacted §1983, is relevant that in recent years courts have considered the question whether transporting the rationales underpinning official immunity to governmental entities would make sense, and have concluded that those reasons do not apply with respect to governmental entities.

This Court recently declared that *Wood's* expressed concern that officers not "exercise their discretion with undue timidity" is not applicable to an award against the public treasury. *Hutto v. Finney*, 436 U.S. 678 (1978). *Hutto* authorized an award of attorneys' fees from a gov-

ernmental entity. The Court criticized the dissenters, who "would apparently leave the officers to pay the award," because the latter result would:

> "def[y] this Court's insistence in a related context that imposing *personal* liability in the absence of bad faith may cause state officers to 'exercise their discretion with undue timidity.' *Wood v. Strickland*, 420 U.S. 308, 321." 436 U.S., at 699, note 32.

Hutto indicates that the Court understands the *Wood* immunity to apply only to "personal" liability, and that the Court does not regard the policy underlying that immunity (preventing "undue timidity" in official decision-making) to be applicable where the award is to come from the entity's treasury.

Hutto's lessons recently have been confirmed by this Court in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979). The plaintiffs owned land in which land use was subject to regulation by the Tahoe Regional Planning Agency (TRPA). Plaintiffs claimed that regulations adopted by TRPA deprived plaintiffs of the economic value of their property without due process or just compensation. Plaintiffs' action under §1983 sought damages from the TRPA and from the individual members of its governing body. This Court held that "to the extent the evidence discloses that these individuals were acting in a capacity comparable to that of a state legislator, they are entitled to absolute immunity from federal damage liability." *Id.* at 406. However, the Court noted:

> "If the respondents have enacted unconstitutional legislation, there is no reason why relief against TRPA itself should not adequately vindicate petitioners' interests. See *Monnell v. Department of Social Service*, 436 U.S. 658." *Id.* at 405, n. 29.

Thus, the Court in *Tahoe* recognized that the concerns which justified the immunity of the TRPA members as individuals did not justify a similar immunity for the entity. Although the TRPA members, as individuals, were held immune from suit under §1983, the Court recognized that an award of damages could be recovered from the TRPA treasury.

In *Kostka v. Hogg,* 560 F.2d 32 (1st Cir. 1977), the Court found the city immune where the facts established only vicarious liability. The Court however commented, "Were we faced with a case in which the municipality had ordered the constitutional violation, the application of the constitutional test could be different." *Id.* at 45.

> "If, on the other hand, the constitutional wrong were the result of a good faith action of a municipal employee, it is not self evident that the overall public interest requires that the municipality always be immune. While the imposition of damages liability on a political subdivision could conceivably result in chilling the performance of some official functions, *the likelihood of substantial inhibition is not great since the officials will not be held personally liable.* In light of the substantial countervailing interest in compensating the victims of unconstitutional conduct, it might well be that, if there were a right of action against governmental bodies, their immunity from damages might be significantly narrower than that of the individual officials." *Id.* at 41. (Emphasis added)

Consideration of possible "corporate" liability is appropriate in any decision-making process, and indeed is essential to assuring that local officials will comport themselves consistently with the federal Constitution. As this Court recognized in an analogous context, *Albermarle Paper Co. v. Moody,* 422 U.S. 405, 417-418 (1975):

> "If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that 'provide[s] the spur or catalyst which causes employers . . . to self-examine and to self-evaluate their employment practices.' "

In *Johnson v. State of California,* 69 Cal.2d 782 (1968), the court considered whether "the danger that public employees will be insufficiently zealous in their official duties" might serve as a basis for entity immunity. Noting that official immunities were developed to protect public employees "from the spectre of extensive *personal* tort liability" (*Id.* at 790) (emphasis added), the court held that it did not "deem an employee's concern over the potential liability of his employer, the governmental unit, a justification for an expansive definition of . . . immune acts." *Id.* at 792. The court "considered it unlikely that the possibility of governmental liability will be a serious deterrent to the fearless exercise of judgment by the employee," but believed that if such deterrence did occur, it might well be "wholesome." *Id.* at 792-93. The *Johnson* decision commented that prior court decisions "hvae criticized legal systems in which the immunity of the public entity corresponds to that of the employee . . ., [because] the reasons for granting immunity to the employee may well differ materially from the reasons for granting immunity to the governmental unit." 69 Cal.2d at 787, n. 3.

Similarly, courts construing the Federal Tort Claims Act have rejected the suggestion that immunity for governmental entities can be justified by the contention that officers will be made unduly timid by the prospect that their actions might result in governmental liability. The prospect of "governmental (as distinguished from personal) liability does not deter governmental employees enough from the vigorous performance of their duties to justify

the loss of a damage remedy for victims of their wrongful acts." *Crain v. Krehbiel,* 442 F.Supp. 202, 216-17 (N.D. Cal. 1978).

Hander v. San Jacinto Junior College, 519 F.2d 273, 277, n. 1 (5th Cir. 1975), declared the "Wood rationale . . . inapplicable to the instant case because the back pay award is entered against San Jacinto College itself and not against the individual members of the Board of Regents."

The Seventh Circuit has gone even further, holding that the public treasury is answerable for compensatory damages (of a legal rather than equitable character) in circumstances where all of the public officials are immune under *Wood v. Strickland* standards. *Hostrop v. Bd. of Jr. College Dist. No. 515,* 523 F.2d 569, 578-579 (7th Cir. 1975).

Similarly, the Fourth Circuit has held that the *Wood* defense is "inapplicable" to a claim for compensatory damages payable from the public treasury, and that proof of "good faith" immunizes the individual officials, but not the public entity, *Bursey v. Weatherford,* 528 F.2d 483, 488-489, and n. 8 (4th Cir. 1975), *rev'd on other grounds,* 429 U.S. 545 (1977). In *Bursey,* the suit was against the public officials in their official capacities, rather than against the entity by name. But as the Fourth Circuit implicitly recognized, and as this Court confirmed in *Monell,* 436 U.S. at 690, n. 55, a judgment against officials in their official capacities runs against the public treasury, not the individual officials.

Thus, modern courts which have considered the factors supporting a good faith immunity for governmental officials have reasoned that those factors do not apply to governmental entities.

We do not ignore the fact that a panel of the 10th Circuit, like the court below, inferred from this Court's ruling in *Monell* that the qualified immunity of local officials in their individual capacities extends to the governmental entity as well. In *Bertot v. School Dist. No. 1, Albany County, Wyoming,* No. 76-1169 (Nov. 15, 1978), *rehearing pending,* a panel of the Tenth Circuit affirmed the trial court judgment reinstating the teacher-plaintiff but on the issue of damages held "Our reading of *Monell* suggests such immunity, short of absolute . . . . Qualified immunity should thus be applied to the board as such and to the individuals in their official capacities." (Slip opinion at pp. 5-6). The opinion does not explore the legislative history of §1983. Judge Breitenstein's dissenting opinion seems well premised on the relevant considerations:

> "For reasons stated in Wood v. Strickland, 420 U.S. 308, 313-322, members of municipal bodies are not monetarily liable in their individual capacities for good-faith actions. No anomaly or inconsistency exists when the same individuals are held liable for the same actions when sued in their official capacities. The distinction is between individual and official responsibility."
>
> * * *
>
> "It may be that Congress should provide some exemption of, or limitation on, liability of a municipal agency. It has not done so. The determination of the relief authorized by §1983 is a judicial responsibility which may not be avoided. As written, §1983 does not recognize the good-faith defense or limit the form or scope of judicial relief.
>
> "A person may not be penalized for the proper exercise of a constitutionally protected right. Perry v. Sindermann, 408 U.S. 593, 598, and Shelton v.

> Tucker, 364 U.S. 479, 485-487. . . . A finding of good faith on the part of the district and its trustees does not preclude recovery of monetary damages." (Slip opinion, dissenting opinion pp. 2-4)

Bertot is now pending before the court en banc (argued May 15, 1979). No decision has been handed down.

The Eighth Circuit in its first ruling in the instant case (Pet. App. at A8-A47) held:

> "Moreover, the primary justification for the defense of good faith in *Wood*, to insure that public officials will not hesitate to discharge their duties out of fear of personal monetary liability, see 420 U.S. at 319-21, does not exist where the city itself will bear the monetary award." *Id.* at A39.
>
> "[W]e hold the good faith defense unavailable as a matter of law in cases involving claims for backpay and similar equitable remedies which will be borne by a unit of government and not individual office holders." *Id.* at A41.

The panel in its second opinion reaffirms that "In our prior opinion . . . we rejected its [the good faith defense] use in an action where back pay is an element of the equitable relief sought, as in the instant case." *Id.* at A5-A6. However, the panel then concluded that such a distinction was undermined by *Monell*, holding (incorrectly we submit) that "the immunity discussion in *Monell* suggests that a limited immunity defense will apply to claims for equitable relief against municipalities." *Id.* at A6. The opinion on remand did not discuss the legislative history of §1983 nor express any rationale for revising its prior opinion that the individual immunity doctrine of *Wood* does not apply to the municipality itself. It gave no explanation for denying recovery under its prior decision *except* its erroneous statement that *Monell* suggests such

limited immunity defense for municipalities. As we have discussed (Part I, *supra*), *Monell* neither decided nor suggested that a municipality as such has a good faith defense to a §1983 case.

It is our strong conviction that the good faith defense of individual officials has no relevance to municipalities. The scope of municipal liability is left far from absolute by this Court's exclusion of liability under *respondeat superior* and its requirement that the conduct involve official action.

V

Municipalities Have No Immunity From the Award of Equitable Relief, Declaratory Judgments, or Attorneys Fees.

Despite twice finding that plaintiff had been deprived of liberty without due process of law (Pet. App. at A3 and A41), the Court of Appeals refused to grant equitable or declaratory relief or to remand for a determination of attorneys fees.

In refusing to grant equitable relief, the court reversed its previous position that "[t]he good faith of the municipality does not constitute a defense to monetary relief as an element of equitable relief." Pet. App. at A38-A39. It was a drastic departure from previous holdings. E.g., *Strickland v. Inlow*, 485 F.2d 186, 190 (8th Cir. 1973) ("Good faith is a defense in damage actions, but not in actions for equitable relief."), *position on immunity sustained sub nom., Wood v. Strickland*, 420 U.S. 308, 314-315 at n. 6 (1975) ("immunity from damages does not ordinarily bar equitable relief as well."). The denial of equitable relief on the basis of the good faith of defendants flies in the face of inumerable decisions of this court granting equitable relief under §1983 without any indication that

the defendants had acted in bad faith. E.g., *Cleveland Board of Education v. La Fleur,* 414 U.S. 632, 638 (1974) (affirming backpay award as "appropriate relief"—see 326 F.Supp. 1159, 1161 (E.D. Va. 1971)); *Vlandis v. Kline,* 412 U.S. 441, 444-445, 454 (1973) (ordering reimbursement of tuition collected in violation of constitutional rights).

Restitution in the form of back pay (or its lesser monetary equivalent)[6] has consistently been held to be an incident to equitable relief. *N.L.R.B. v. Jones & Laughlin Steel Corporation,* 301 U.S. 1, 47-48 (1937). It is "not comparable to damages in a common law action . . . ." *Harmon v. May Broadcasting Co.,* 583 F.2d 410, 411 (8th Cir. 1978) (citing cases).

Section 1983 specifically provides for a "suit in equity." In enacting that language, the 42nd Congress must have been aware that, unless it gave a clear indication to the contrary, §1983 would authorize the full panoply of equitable remedies. As early as 1836, this court had declared "The great principles of equity, securing complete justice, should not be yielded to light inferences or doubtful construction." *Brown v. Swann,* 10 Pet. 497, 503 (1836). In a more recent statement of the rule, the court said, "Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Porter v. Warner Co.,* 328 U.S. 395, 398 (1946); *accord, Mitchell v. DeMario Jewelry,* 361 U.S. 288, 291-292 (1960) ("When Congress entrusts to an equity

6. In its original opinion, the Court of Appeals, rather than ordering back pay as such, ordered a lesser equitable equivalent "measured by the amount of money [plaintiff] likely would have earned to retirement if he had not been deprived of his good name by the action of the City, subject to mitigation . . . ." Pet. App. at 38. This relief was not the equivalent of common law damages since it included no compensation for such non-work-related losses as damage to social reputation, emotional distress, and loss of standing in the community.

court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes.")

Sustaining a holding that "good faith" bars equitable relief as well as damages would effectively eliminate incentives to test the constitutionality of any governmental action not previously declared unconstitutional. If coupled with a holding that "good faith" bars declaratory relief as well, it would reduce most pioneering constitutional litigation to an impermissible request for an advisory opinion.

The Court of Appeals' refusal to order the entry of a declaratory judgment that plaintiff's rights were violated —a judgment fully supported by the court's conclusion in each of its opinions that they had been—is inexplicable. Plaintiff knows of no basis or authority for the proposition that immunity bars declaratory relief. *Cf., Carey v. Piphus,* 435 U.S. 247, 252 (1978). In a case such as this, in which plaintiff's good name, reputation and honor are at stake, a declaratory judgment is important for its own sake. Moreover, it would permit plaintiff to recover his attorneys fees under the Civil Rights Attorneys' Fees Awards Act of 1976 (codified at 42 U.S.C. §1988) and this Court's decision in *Hutto v. Finney,* 437 U.S. 678 (1978).

CONCLUSION

We conclude that cities had no "good faith" defense under the common law; that the 42nd Congress would not have created such a defense without doing so expressly, and that the objective of the Civil Rights Act of 1871 to broadly protect individual constitutional rights does not permit an inferential conclusion to the contrary.

Our conclusions are buttressed by the policy arguments against providing cities with the "good faith" defense afforded local governmental officials.

We again point out that under *Monell* which denies municipal liability in *respondeat superior* situations and which requires that city liability be premised on "official policy" the scope of the liability of cities under §1983 is far from absolute.

We, therefore, conclude that the qualified immunity available to local officials in their individual capacities should not be extended to immunize local governmental bodies; and that petitioner should be granted an equitable award in lieu of back pay, a declaratory judgment that his discharge from employment deprived him of constitutionally protected liberty without due process of law, and an allowance of reasonable attorney fees.

We respectfully submit that the opinion of the Eighth Circuit on remand should be reversed and the cause remanded for appropriate relief.

Respectfully submitted,

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